

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

In Re: MidAmerican Energy Company)	
Verified Petition for a Declaratory Ruling)	Docket No. 03-0659
)	
)	
)	

**REPLY BRIEF ON EXCEPTIONS
OF THE
PEOPLE OF THE STATE OF ILLINOIS**

The People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois (“the People”), submit the following Reply Brief on Exceptions in the above captioned proceeding.

I. INTRODUCTION

The AG disagrees with MidAmerican Energy Company’s Brief on Exceptions (“MEC’s BOE”) and agrees with the Administrative Law Judge’s Proposed Order (“P.O.”) on nearly every point of factual and legal analysis presented in the P.O. and in MEC’s BOE. The AG’s reasons for its agreement with the P.O. and its disagreement with MEC’s BOE were presented fully in the AG’s response to MEC’s Petition for a Declaratory Ruling, filed on December 3, 2003, (“AG Response”) and will not be repeated here.

The P.O. presented analysis and recommended answers to the three questions posed in MEC’s Petition for a Declaratory Judgment (“MEC’s Petition”) The AG agrees with the P.O.’s analysis and recommendations. Accordingly, the AG urges the

Commission to issue an order answering “yes” to question one, “yes” to question two, and exercising its discretion to not answer question three.

The one point raised in MEC’s BOE that the AG feels warrants further consideration is MEC’s assertion that “[t]he Commission should recognize that the Proposed Order suggests that the Commission go well beyond its charge of answering the questions posed to the Commission in MidAmerican’s Petition.” MEC BOE at 41. The AG’s agreement with this point will be discussed in detail below.

II. ARGUMENT

The AG agrees with the analysis and findings in the P.O. and disagrees with MEC’s BOE on at the following points:

A. MEC is incorrect in its assertion that there is no reason that a utility division should be prevented from doing something that a utility affiliate can do.

MEC claims that there is no reason, policy, legal, or otherwise that a Utility division should not be permitted to do something that a utility affiliate is permitted to do. MEC BOE at 14. The legal reasons for such prohibitions are clear, and are discussed fully and correctly in the P.O. The policy reasons are also clear; if regulated utilities are allowed to operate in the same manner as unregulated utilities, then the distinctions between the separate legal frameworks applicable to regulated utilities and unregulated utility affiliates become meaningless.

B. The AG disagrees with MEC’s position that it is permitted, under the PUA, to make non-tariffed retail sales of gas commodity to commercial customers.

MEC asserts that it is permitted, under the PUA, to buy commodity gas at wholesale and sell it to end use customers (MEC’s BOE at 22) and that nothing in the

PUA prevents MEC from providing competitive service through a division of its utility. MEC BOE at 12. Here again, the AG disagrees with MEC and agrees with the analysis and conclusions contained in the P.O. on both of these points.

MEC's position depends on reading a distinction between "gas" and "heat" into the PUA. The P.O. correctly finds that this distinction, as presented by MEC, is unsupportable. P.O. at 15. MEC's position further depends on a determination that the retail sale of natural gas commodity to commercial customers is not a public utility service. The P.O. correctly determines that such sales are a public utility service. P.O. at 17. Finally, MEC's position depends on a statutory interpretation that works around the clear prohibition on public utilities making non-tariffed sales of natural gas commodity found in Sections 9-102 and 9-104 of the PUA. The P.O. correctly determines that MEC's statutory interpretation is unsupportable, and that such sales are prohibited. P.O. at 17-18.

C. For the reasons presented in the AG's Reply to MEC's Petition and in the P.O., the AG urges the Commission to answer the first two questions posed in MEC's Petition in the affirmative, and to not answer the third question.

MEC's Brief on Exceptions restates the three questions that MEC originally presented to initiate this proceeding, and suggests that each of them be answered in the negative. MEC BOE at 50-51. MEC has not provided any new argument in support of its proposed answers. The AG has already evaluated MEC's proposed answers and arguments in support thereof, and responded fully.

Accordingly, for reasons stated in its reply to MEC's petition, and in the P.O. the AG recommends that the Commission answer the first two questions MEC posed in its Petition For a Declaratory Ruling in the affirmative. The AG is convinced, for reasons

presented in the P.O., (P.O. at 19) that the Commission should, pursuant to Section 200.220(a) of its rules of practice, exercise its discretion and decline to answer the third question.

D. MEC's Brief on Exceptions raises a legitimate substantive question concerning the appropriateness of including a remedy in the Proposed Order not requested in MEC's petition.

The P.O. states that “determining that the Act prohibits MEC from making the competitive sales is not, however, the end of the Commission’s inquiry” and suggests further relief. P.O. at 18. MEC questions the appropriateness of including further relief beyond answering the questions posed in the MEC’s Petition. MEC BOE at 41. The Commission rules regarding declaratory rulings do not specifically address the availability of further relief. 83 Ill. Admin. Code 200.220. Guidance regarding the availability of further relief and the procedure for seeking such relief in declaratory judgment actions in Illinois is found in Illinois case law and statutes.

Illinois law regarding declaratory rulings specifically states that “further relief” in declaratory judgment cases is available, but can be had only through filing of an additional application for such relief. Illinois Law deals with the issue of the availability of “further relief” beyond providing answers to questions presented in 735 ILCS 5/2-701 (Action for Declaratory Judgment) subsection (c) as follows:

(c) If further relief based upon a declaration of right becomes necessary or proper after the declaration has been made, application may be made *by petition* to any court having jurisdiction for an order directed to any party or parties whose rights have been determined by the declaration to show cause why the further relief should not be granted forthwith, upon reasonable notice prescribed by the court in its order.

735 ILCS 5/2-701(c) (emphasis added)

As the statute indicates, and as Illinois decisions support, further relief is available through application to a court having jurisdiction. *Shipka v. Inserra*, Ill. App. 570 N.E. 2d 604, 606, 211 Ill.App.3d 735, 738 (1 Dist., 1991) (“it is within the power of the trial court to grant any consequential relief and dispose of the entire controversy.”); *Richards v. Liquid Controls Corp.*, 26 Ill.App.3d 111,130, 325 N.E.2d 775, 788 (2 Dist., 1975) (“In the process of reaching a result under a declaratory judgment action, the trial court is able to render any further relief necessitated by its deliberations.”)

Since it is clear that further relief is available in declaratory judgment actions in Illinois courts, the remaining issue of relevance to this proceeding is whether a court can grant further relief in a declaratory judgment proceeding relief *sua sponte*. Illinois cases indicate that courts cannot grant further relief *sua sponte*, because doing so would go beyond the purpose of the Illinois Declaratory Judgment law. In *Richards v. Liquid Controls Corp.* the court described the purpose of the Illinois Declaratory Judgment law as follows:

“The very purpose of the declaratory judgment procedure is to obtain a judicial resolution of an actual controversy without requiring the disputants to irrevocably jeopardize their rights.”

Richards v. Liquid Controls Corp. Citing La Salle Cas. Co. v. Lobono (1968), 93 Ill.App.2d 114, 117, 236 N.E.2d 405, 407.) The case the *Richards* court cites contains further interpretation of the purpose of the Illinois Declaratory Judgment law as follows:

This remedy [a declaratory judgment] is strictly procedural. It creates no new substantive rights. It is designed to afford security and relief against uncertainty with a view to avoiding litigation, rather than in aid of it, and to settle and fix rights before there has been an irrevocable change of position of the parties in disregard of their respective claims of right, and thus promote peace, quiet and justice, with the end always constantly in view

that one of the chief purposes is to *declare rights rather than to execute them*.

La Salle Cas. Co. v. Lobono (1968), 93 Ill.App.2d 114, 117, 236 N.E.2d 405, 407. *Citing Freeport Motor Cas. Co. v. Tharp*, 406 Ill. 295, 299, 94 N.E.2d 139, 14 (1950)(emphasis added) (Overruled on other grounds).

The *Freeport* court, writing shortly after the Illinois Declaratory Judgment law was enacted, described declaratory judgments as follows:

a declaratory judgment, ... is a relatively new innovation in the law. It is neither legal nor equitable but is *sui generis*... Its purpose is to declare the rights of the parties but is not compelling in itself.

Freeport Motor Cas. Co. v. Tharp, 406 Ill. 295, 299, 94 N.E.2d 139, 14(1950). (Internal citations omitted) (Overruled on other grounds)

The Illinois Supreme Court has recognized a limitation on ordering relief beyond what parties have requested in declaratory judgment actions. *Nelson v. City of Rockford*, 167 N.E.2d 219, 220, 19 Ill.2d 410, 414 (Ill. 1960) In *Nelson*, the Court found that the lower court had impermissibly issued building permits in a declaratory judgment action where no party had requested their issuance, that the lower court erred further by issuing a restraining order where there was no occasion for entry of such an order, and that the lower Court's judgment was "obviously too sweeping" and "seems to flow from the court's misconception of the purpose of a declaratory judgment." *Nelson* at 221.

Additional support for the proposition that courts cannot grant relief beyond what parties ask for in declaratory ruling actions is found in *Chester v. State Farm Mut. Auto. Ins. Co.*, 591 N.E.2d 488, 491, 227 Ill.App.3d 320, 324, (2 Dist., 1992) ("an issue not

presented by the pleadings and not fully tried cannot be decided in a declaratory judgment action.”)

Finally, Black’s law Dictionary defines a “declaratory judgment” as “A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.”

declaratory judgment. A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. Declaratory judgments are often sought, for example, by insurance companies in determining whether a policy covers a given insured or peril. -- Also termed *declaratory decree; declaration.*

Black's Law Dictionary (7th ed. 1999), judgment.

The “remedy” found in the P.O. represents a *sua sponte* grant of further relief in a declaratory judgment action, which, as demonstrated, is contrary to Illinois law.

III. CONCLUSION

Accordingly, the AG recommends that the Order in this proceeding be limited to answering the three questions posed in this case, and that, for reasons presented in the AG's Reply and in the P.O., the first two questions be answered in the affirmative and the third question be left unanswered. The AG recommends that the Order should not contain any relief beyond answering the questions presented. Any additional action with regard to enforcement stemming from the Commission's declaratory judgment should take place in a separate proceeding.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By. LISA MADIGAN
Attorney General of Illinois

April 12, 2004

By: _____
RANDOLPH R. CLARKE
Assistant Attorney General
Public Utilities Bureau
100 West Randolph Street
11th Floor
Chicago, Illinois 60601
Telephone (312) 814-8496
Fax: (312) 814-3212
E-mail:
rclarke@atg.state.il.us

This document was created with Win2PDF available at <http://www.daneprairie.com>.
The unregistered version of Win2PDF is for evaluation or non-commercial use only.